Swiss Competition Law - Quo vadis? (Interview)

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The 2016 St.Gallen International Competition Law Forum ICF will serve as the backdrop for discussions on a variety of current competition law, economics and policy topics. One of the panels is going to focus on the future of competition law in Switzerland.

As Dr. Marino Baldi points out: "the Swiss Cartel Act of 1995 entered into force almost exactly 20 years ago. In 2003, a review of the law was conducted which mainly related to the introduction of direct sanctions. In 2011 the Swiss Government made some further proposals to amend the law. These proposals were turned down by the Swiss Parliament in 2014. Many think this is no great pity. Nevertheless, one or another of the Government's proposals might be worth being considered again, perhaps not exactly in the same way as before. I am thinking in particular of improvements in the law concerning private enforcement. In addition, there have recently been intense discussions of certain features in the law which might also sooner or later end in legislative proposals."

The following interview between FORMER AMBASSADOR DR. MARINO BALDI (Senior Counsel, Prager Dreifuss) and NICOLAS BIRKHÄUSER (Partner and Attorney-at-Law, Niederer Kraft & Frey), PROF. DR. ANDREAS HEINEMANN (Professor of Commercial, Economic and European Law, University of Zurich UZH; Vice-President, Swiss Competition Commission) and DR. RETO JACOBS (Partner and Attorney-at-Law, Walder Wyss) offers you some food for thought and a starting point for our panel discussion.

Join us in St.Gallen on May 19th and 20th for the "SWISS COMPETITION LAW - QUO VADIS?" panel. More information about the conference and a list of the remaining panels and speakers is available on www.sg-icf.ch.

1. Erheblichkeit: "de-minimis rule" vs. "rule of reason"

MARINO BALDI: Article 5 of the Swiss Cartels Act (SCA) contains the rules on restrictive agreements. One of the most disputed question relating to this Article concerns the test that triggers off the application of the provision. Under EU law the respective test is about whether a particular agreement has an

"*appreciable effect*" on competition. The German term under EU law for appreciable is "*spürbar*". The idea of the respective criterion is to sift out agreements that have only a "minor effect" on competition. The Swiss law uses the term "*erheblich*" instead of "*spürbar*". This has led a number of Swiss commentators to argue that "*erheblich*" stands for a more ambitious test than "*spürbar*" – namely a test requiring a decision on the "*appropriateness*" of a restraint on competition in the sense of the American Rule of Reason. So far, neither the Swiss Competition Commission nor the Federal Administrative Tribunal has positioned itself clearly with regard to the issue. A decision is expected in the near future by the Federal Court of Justice (FCJ).

Could you briefly explain what arguments speak in favour of either of the two solutions? Furthermore: Can the problem that some have with a mere de-minimis rule (instead of a full-fledged rule of reason) be related mainly to verticals (e.g. distribution agreements providing for territorial protection), and can it be argued that the real issue is of a more fundamental nature and has a lot to do with a perhaps unfortunate formulation of the legal presumptions on vertical agreements that came into the law via a parliamentary motion in 2003? After all, there might be little controversy, if any, as to whether horizontal agreements on prices or on the allocation of markets normally do have an effect on competition that justifies a thorough examination or, as the case may be, a straight verdict without an arduous preliminary test.

NICOLAS BIRKHÄUSER: In response to your introductory remarks regarding significance, I agree that the terms "*spürbar*" or appreciable under EU law and "*erheblich*" or significant under Swiss law are not the same. The difference between EU and Swiss competition law does however not primarily lie in the different terms, but in the different concepts of the competition laws. According to Article 96 of the Swiss Constitution, "*the Confederation shall legislate against the damaging effects in economic or social terms of cartels and other restraints on competition.*" According to Article 101 TFEU (Treaty on the Functioning of the European Union) "*any agreements or decisions prohibited pursuant to this Article shall be automatically void.*" These two concepts are different. The Swiss Constitution requires a competition law that is directed against damaging effects, i.e. an effects based approach. Competition law in Switzerland cannot prohibit cartels and other restraints on competition as such, but only their actual damaging effects. Accordingly, under Swiss law, conducts can only be prohibited if they actually significantly restrict competition, because, if there is no actual restraint on competition, there can be no damaging effects in economic or social terms. Conducts that do not significantly restrict competition are lawful under Swiss law. Differently, the TFEU stipulates that certain categories of conducts are automatically, i.e. per se, void.

In response to your question what arguments speak in favour of the two solutions, i.e. of the effects based approach or the "*more ambitious test*" that you mention on the one hand and of the per se prohibition approach on the other hand, I should, at this point, only mention a few arguments, thereby limiting my answer to Swiss competition law. One argument that appears to be brought forward against the effects based approach rather often is that the effects based approach requires a thorough examination and an "*arduous preliminary test*" as you state. One argument in favour of the effects based approach is that only conducts that actually restrict competition and that have damaging effects are prohibited, which allows to restrict private autonomy and the constitutional right of economic freedom only to the extent that there is an actual significant restraint on competition and damaging effects. The proponents of the effects based approach

argue that, where conducts do not actually restrict competition and have no damaging effects, there is no need to intervene. Personally I favour the latter view. Speaking of Switzerland, there is, in my view, anyway no basis to intervene where conducts do not actually restrict competition and have no damaging effects because Article 96 of the Swiss Constitution requires an effects based approach.

Assuming that the wide interpretation – requiring a sort of Rule of Reason test - will be supported by the FCJ, how would you then describe the meaning of the efficiency test in Article 5 para. 2 SCA. Because Article 5 as a whole not only - more or less - mirrors Article 101 AEUV with respect to the so-called "*de-minimis rule*", but also with respect to the exemption clause (Article 101 para. 3) which among Swiss lawyers is often referred to as the efficiency test. If the Swiss "*Erheblichkeitstest*" is given the meaning of a full-fledged US style Rule of Reason then there would under Swiss law be an overlap with the role of the efficiency test. The latter provision could in such a case be given the meaning of a device aimed at justifying any cartel according to economic or other policy considerations. Is this what the advocates of a broad *Erheblichkeitstest* have in mind?

NICOLAS BIRKHÄUSER: It is interesting to analyse which parallels exist between the effects based approach according to Article 96 of the Swiss Constitution and the rule of reason in the USA. I understand that the concept of the rule of reason is used to interpret the Sherman Act (which is itself strict and considers certain conducts as per se prohibited) in a way that certain conducts are only considered prohibited when they actually have effects on competition. Thus, the concept of the Sherman Act including the rule of reason in the USA and the concept of the genuinely effects based approach according to Article 96 of the Swiss Constitution in Switzerland appear to be different. However, there may be parallels with regard to the result of the assessment as I understand that, based on the rule of reason, the Supreme Court in the USA removed a number of conducts from the category of per se prohibited conducts and held that they are only prohibited subject to an effects based analysis under the rule of reason. This appears to apply in particular to vertical restraints.

Considering your question whether there would be an overlap of the Swiss "*Erheblichkeitstest*" under Article 5 para. 1 SCA, i.e. the requirement of an actual restraint on competition and of damaging effects, with the efficiency test under Article 5 para. 2 SCA, i.e. the justification on grounds of economic efficiency, I do not think that there is an overlap: The test whether a conduct is justified on grounds of economic efficiency is not the same as – and does not replace – the test whether a conduct actually significantly restricts competition and has damaging effects. Conducts that do not actually restrict competition and have no damaging effects are lawful under Article 96 of the Swiss Constitution and cannot be prohibited, irrespective of whether they are efficient or not. The latter question does not need to be answered as there are no damaging effects. Only if competition is affected and if there are damaging effects, the question must be assessed whether certain conducts should nevertheless be permitted due to economic efficiency.

2. Relative market power and dependency

MARINO BALDI: Among the proposals that were refused by Parliament during the latest review exercise was also a provision aimed at introducing the concept of relative market power as a prerequisite of abusive behaviour -

in addition to the traditional concept of (absolute) market dominance. This addition proposed by a parliamentary motion was mainly thought to help combating the higher prices Swiss retailers often have to pay to manufacturers in EU countries, when compared to the prices retailers domiciled in EU countries have to pay. Strictly speaking, the concept of relative market power was already introduced into Swiss law in 2003 by way of a slight addition to the definition of market dominance, but the new proposal put forward in the Swiss Parliament aimed at giving the concept much more importance by adding language about economic dependence taken from German legislation (§ 20 para. 2 German Law Against Restraints on Competition). This more explicit approach has in the meantime become the subject of a parliamentary initiative meant to supplement the present law (INITIATIVE SR ALTHERR).

It is a matter of fact that Swiss retailers oftentimes have to pay significantly higher prices to manufacturers in the EU than do retailers domiciled in the EU. This contributes to the already high prices in Switzerland, primarily based on high costs – and thereby adversely affects the economic location Switzerland. Do you think new legal provisions such as the ones proposed can make a considerable contribution towards solving this problem? If yes, do you think the legal provisions as they have been applied in Germany now for over 40 years could be a model to be used in Switzerland? By the way, if in Switzerland a need is felt to become active in terms of competition law, could the language adopted in 2003 to clarify Swiss existing law (Article 4 para. 2 SCA) be a sufficient basis?

RETO JACOBS: It is undisputed that for many products higher prices are charged in Switzerland than in other European countries. The reasons for these price differences are however not so obvious. While the selling companies cite the higher costs in Switzerland as being the main reason, the buyers argue that the sellers just want to profit from the wealth and the high spending capacity in Switzerland. The public opinion is clear: it demands measures against the high prices in Switzerland. If politics decides to follow this path the question should be asked whether the concept of relative market power would be the adequate approach. It should be considered that the mentioned price differences are not at all restricted to products sold by companies with a strong market position or brand. It rather seems to be a general phenomenon that most companies – irrespective of their market position – charge higher prices in Switzerland than in other European countries. Thus, it seems questionable that the higher prices are due to the seller's market position and therefore, one should be rather careful in implementing a special regime for companies with such a position only.

In the context of relative market power two main types of "*economic dependence*" may be distinguished. First, there is dependence relating to a strong brand which a retailer cannot afford not to sell in its shops (main concern of the INITIATIVE ALTHERR – example MIGROS/NIVEA). The second type of economic dependence is about relatively small manufacturers producing branded goods for the sale of which they cannot do without a particular large retailer (case COOPFORTE which was settled amicably, i.e. without a decision on the subject-matter). Would enhanced legal action regarding this latter type of dependence be desirable?

RETO JACOBS: Since the 2003 revision Swiss law has allowed to take into account specific economic dependence while applying the rules regarding abuse of a dominant position (Article 4 para. 2 SCA). After more than ten

years, it is noticeable that there are hardly any cases in which this concept has been applied. Thus, the legislator should be rather reluctant in introducing further amendments in this direction because it could well be that in practice such economic dependence is not much of an issue. Otherwise we should have seen at least some cases coming up in the last few years.

3. Private enforcement

MARINO BALDI: Private enforcement of competition law has so far not been an important feature in any of the European jurisdictions. This stands in contrast to the much more developed US private antitrust enforcement system which, from its very beginning, has put the existence of subjective rights to claim damages in the centre of its endeavours to give effect to the law. In Europe, the awareness of the importance of private enforcement of competition law has only been growing in recent years. A significant step was taken when, in 2014, the EU passed its "Damages Directive for competition law claims" (Directive 2014/104/EU) which has the aim to facilitate private claims in Member States under EU and national competition laws.

In Switzerland the 1995 Cartel Act mainly introduced two novelties with a view to facilitating private enforcement. First, it harmonized – really unified - the substantive rules applicable in private law suits on the one hand and administrative proceedings on the other (before we had two different sets of rules). Second, given the complexity of certain competition law cases - and inspired by the "preliminary ruling system" in the EU - a provision was introduced (Article 15 SCA) to commit civil courts to asking the Competition Commission's view if a particular case is contentious as to its substantive qualification. Such an opinion is however not compulsory, unlike preliminary rulings under EU law would be.

There is certainly room for further improvement of the Swiss system as it relates to private enforcement of the law, particularly as to claims for damages. In which respects should, according to you, such improvements mainly be envisaged? Would it, for instance, be a good idea to implement in our country more or less the same measures as are provided for in the aforementioned Directive of the EU?

ANDREAS HEINEMANN: The situation in Switzerland of private enforcement of competition law is totally unsatisfactory. There is private enforcement in the books, but hardly in action. Up to today, there is only one successful court decision on cartel damages. From time to time, competition law is used as a shield against contractual claims by pleading the competition law invalidity of the underlying contract. The lack of practice is due to fundamental flaws of the legal framework (e.g. no standing of consumers). The interesting point is that during the deliberations on the reform of the Cartel Act, the need for improvement of private enforcement was not subject to doubt. The reform was rejected for other reasons. Therefore, I would highly recommend to include private enforcement into the next reform of competition law.

Regarding substance, I think it is a good idea to evaluate carefully the EU Directive on Damages in competition law. The EU approach is characterized by the search of a middle way: On the one hand, the claims of victims shall become reality. On the other hand, a US style litigation culture – which by many in Europe is considered excessive – shall be avoided. The Swiss perspective shares the goal of striking a balance between these two

poles. The cornerstones of reform should therefore be an effective right to obtain full compensation for the harm suffered while renouncing on overcompensation through double or treble damages. The passing-on defence should be accepted, but the legislator should clearly attribute standing to consumers. Accepting passing-on while denying standing to consumers (which is the prevailing view) leads to no compensation at all if the harm has completely been passed through the distribution chain onto final consumers. Because of the phenomenon of scattered damages and rational apathy, collective redress should be introduced. It seems prudent to start with an opt-in system while observing the experience of countries like the UK which are introducing an opt-out system. The limitation period has to be extended, and limitation should be suspended during the administrative proceeding and during consensual dispute resolution. Moreover, there will be no progress of private enforcement if there is not a considerable easing of the plaintiff's access to evidence in the hands of the defendant. The approach of the EU Directive on this topic seems well balanced.

The EU Directive may give a lot of inspiration for the reform of Swiss law. However, its contents have to be assessed critically. For example, it is hardly convincing that the principle of joint and several liability of all infringers shall under certain conditions not apply to small and medium enterprises. On the other hand, Swiss law should adopt explicit rules in fields not sufficiently covered by the EU Directive, for example on costs of litigation and on liability within groups of affiliated companies.

Irrespective of any such new features, don't you think that a very important, or even indispensable, contribution towards advancing private enforcement activities would be a thoroughly convincing practice of the Competition Commission (and the Courts), in that such practice could provide for sufficient legal certainty as to the qualification of certain types of anticompetitive behaviour, thereby minimizing the procedural risk for claimants?

ANDREAS HEINEMANN: I share the view that public and private enforcement of competition law stand in close relationship. It is certainly right that a competition authority (under the control of the courts) has the task of developing a case law which sheds light on the exact conditions for competition law application. Leading cases in all fields of competition law should be the result. However, experience shows that it takes a lot of time to get there. This year, we commemorate the twentieth anniversary of the entry into force of the Swiss Cartel Act. But still we are faced with difficulties concerning fundamental categories like the "significance" of a competition restriction. Therefore, we cannot expect fast results with respect to private enforcement, even less if new rules are introduced into the law. But it is certainly true that the barriers to private enforcement will decline to the extent that the contours of the competition law prohibitions become sharper.

In this context, I would like to pick up the introductory remark you made: While the preceding legislation provided for differing rules, the Cartel Act of 1995 has harmonized substantive law for all purposes. Hence, the same substantive rules apply in public and in private enforcement. I have the impression that this fundamental achievement is not sufficiently reflected in practice. When applied by way of public enforcement, far-reaching requirements are sometimes read into the text which in a private lawsuit never could be established by the party bearing the burden of proof. Therefore, it would be very useful if public instances were more aware of the different enforcement mechanisms and the

need for a harmonized interpretation of substantive competition law for both public and private enforcement. On the other hand, the civil law judge should bear in mind the difficulty of establishing complex economic chains of effects and adapt the standard of proof accordingly. For this goal, the judge should be even more flexible when it comes to stand alone actions.

Besides, while public enforcement can help to interpret substantive law, it is up to the civil law judge to identify the harm, to determine the quantum and to establish the causal link between infringement and the damages sustained. Public enforcement is of no great help for that although the EU Directive (in Article 17 para. 3) sets some hope into more interaction between private and public enforcement. Even if these expectations go too far, it would already be a very positive step if frictions between public and private enforcement could be reduced to a minimum. This is why decisions in public enforcement should be accepted as precedents in private enforcement, and why special protection of leniency applications is necessary when it comes to the availability of certain evidence produced in administrative or criminal proceedings.

Marino Baldi is Senior Counsel with Prager Dreifuss AG. Before he acted as an Ambassador for foreign economic affairs and a member of the Executive Board of the Swiss State Secretariat for Economic Affairs. In this capacity, he played a leading role in the drafting of federal law statutes, such as the current Cartel Act and the Internal Market Act. For twelve years he was a member of the Swiss Competition Commission.

Nicolas Birkhäuser has been practicing competition law for many years, including merger control, horizontal and vertical restraints, exchange of information, distribution, parallel imports, cooperation, joint ventures, dominance, compliance, risk management, with a particular focus on investigation proceedings, including dawn raids and leniency programs, coordination with multijurisdictional proceedings. See www.nkf.ch.

Andreas Heinemann is Professor of Commercial, Economic and European Law at the University of Zurich, permanent visiting professor at the University of Lausanne and vice president of the Swiss Competition Commission. His research focuses on Swiss, European and International Economic Law with a special emphasis on competition and IP law.

Reto Jacobs heads the Antitrust and Competition Team of Walder Wyss Ltd. He advises domestic and foreign companies on all competition law issues, represents them before competition authorities and courts, and assists them in complex merger filings. He supports various companies regarding their antitrust compliance programs. He is lecturer at the University of St.Gallen HSG.